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No. 654

Supreme Court of the United States

October Term, 1964

NG SUI SANG,

Petitioner.

AGAINST

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ABRAHAM LEBENKOFF
AND
JULES E. COVEN,
Attorneys for Petitioners,
33 West 42nd Street,
New York 36, N. Y.

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P. A. ESPERDY, as District Director of the Immigration and Naturalization Service,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the U. S. Court of Appeals for the Second Circuit affirming judgments of the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on August 20, 1964. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Involved

1. May the respondent physically expel the petitioner without a due process hearing?

2. Did the petitioner make an entry into the United States when he broke the conditions of his parole?

3. Should the case of *Leng May Ma* v. *Barber* be overruled?

Statute Involved

Section 212 (d) of the Immigration and Nationality Act, 8 U. S. C. (a), Section 1182 (d) (5) provides that:

> "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

Statement, the Facts

The petitioner, Ng Sui Sang, is a native and citizen of China. He arrived on June 30, 1962, in the United States, as a seaman and rather than being admitted as an ordinary crewman pursuant to Section 252 of the Immigration and Nationality Act, he was allegedly paroled pursuant to Section 212 (d) (5) of the Immigration and Nationality Act of 1952, as amended, 8 U. S. C.—Section 1182 (d) (5).

The respondent claims that the petitioner was first detained on board his vessel as a crewman not eligible for admission. However, there is apparently no record in the Immigration file that reflects this statement.

Although he was paroled, or admitted, only for the period of time that his vessel was in the United States, the petitioner missed his ship and thereafter remained in the United States.

The vessel then left the United States without him and it is believed that his vessel has returned only once to the United States.

After a number of months the petitioner was apprehended by Officers of the Immigration Service and thereafter released upon the posting of a bond. In May 1963, the petitioner received a notice to surrender for the purpose of deportation or removal and at that time the instant action was commenced. The contention of the alien was that he was entitled to a due process hearing under the constitution and the Immigration laws. At the time the action was commenced the petitioner was joined by Wong Hing Fun. Mr. Wong has not joined Ng Sui Sang in this petition.

The District Court granted a motion for summary judgment made by the defendant and dismissed the complaint. On appeal to the United States Court of Appeals for the Second Circuit the judgment was affirmed.

Why Certiorari Should Be Granted

The decision below raises some very important questions effecting the proceedings relating to the exclusion, parole and deportations of aliens who entered the United States as crewmen.

The plight of the petitioner is a perfect example of the unfair, harsh and illegal treatment that a paroled alien crewman receives from the Immigration Service.

The petitioner, Ng Sui Sang, arrived on June 30, 1962. The terms of his admission were that he remained here as long as his vessel was in the waters of the United States. Although he was found to be a bona fide crewman, he was apparently detained on board due to some questionable regulation of the Immigration Service and finally he was paroled pursuant to Section 212 (d) (5). After the ship left the United States without him, the alien continued to remain in the United States until he was apprehended by officers of the Immigration Service, his parole summarily revoked, and he was advised he would be deported from the United States when the ship he arrived upon returns to the waters of the United States. When the ship was due in port, he was advised to surrender for purposes of being removed from the United States.

Although paroled, according to the Immigration Service records he was accorded the same treatment as any other alien crewman who was admitted to the United States with a conditional landing permit. An alien crewman who does not depart with his vessel, is entitled to a deportation hearing under the Immigration statutes and under the Constitution of the United States.

The petitioner herein gets nothing. He does not receive a hearing, he does not appear before any impartial officer, he is placed in the hands of the transportation and deportation departments of the Immigration Service for summary explusion.

An alien other than an alien crewman, if he is paroled into the United States, is at least given an exclusion hearing at which time he appears before an impartial officer

of the Immigration Service, to wit, a Special Inquiry Officer. The petitioner herein is not even accorded this limited type of hearing. An alien who appears in an exclusion hearing has the right to be represented by counsel. The petitioner herein was denied this basic constitutional right. In the case of *U. S. A. Paktorovics* v. *Murff*, 280 F. 2d 610, the court stated:

> "Accordingly, since a construction of section 212 (d) (5) of the Act, 8 U. S. C. 1182 (d) (5), which requires a hearing on the subject of revocation of parole, will remove serious doubt regarding the validity of the statute, we construe the section and hold that appellant is entitled to a hearing prior to the revocation of his parole".

There are many other questions which cannot and should not be decided by an enforcement officer of the Immigration Service. Certainly, the question of where the petitioner is to be sent is an important factor that should not be left to the whim of the deportation clerk. In the case at the bar, the enforcement officer is a judge, jury, investigator, witness and warden. As was stated in the *Paktorovics* case, above, the constitutionality of this procedure is subject to question.

The procedure followed by the Immigration Service in the removal of paroled crewmen is significant to the complaint raised by the petitioner. Ng Sui Sang is not to be deported or removed as are other aliens but, in fact, he is to be placed back upon the ship on which he arrived in the United States. It is presumed that he will be forced to work for the shipping company. In essence, he and other alien crewmen in a similar position are being legally "shanghaied".

The illegality of the summary treatment of alien crewmen was ruled upon in the case of *Szlajmer* v. *Esperdy,* 188 F. Supp. 491, where the Court held that a crewman whose landing permit was revoked, was entitled to be heard on a claim of physical persecution under section 243 (h) of the Immigration and Nationality Act. That case is very similar to the instant case and when a difference occurs in the same circuit, certainly, the matter should be ruled upon by the highest Court in the land.

Leng May Ma v. *Barber,* 357 U. S. 185 (1958) held that an alien other than an alien crewman who was paroled into the United States was not eligible to apply for a stay of deportation because he would be physically persecuted in the country he was to be deported to. The ruling was based upon the fact that a paroled alien was not in the United States and, therefore, could not request the benefits of the deportation statutes of the Immigration Law. However, in that case Leng May Ma was entitled to an exclusive hearing, and was accorded due process in his other dealings with the Immigration Service. Even now, in view of the changing times and in view of the harsh result of *Leng May Ma* v. *Barber,* possibily, this question should be given further attention by this Court.

In dealing with Section 212 (d) (5), we are dealing with a legal fiction. The physical entry of an alien into this country, is discounted under the parole theory and it is said that the person is not "here" and therefore not entitled to a hearing under the deportation section of the Immigration Laws.

If this be so, then the petitioner submits that he made an entry, albeit an illegal one, when his vessel left the United States. The respondent's contention is that the petitioner was first detained on board and then paroled,

implying that he was technically still aboard, as a detained crewman, but detention facilities were enlarged to permit his going ashore. He, legally speaking, should have been considered to be in the custody of the ship's captain. His parole would therefore terminate at the time that the ship left the United States. The period of his parole did end when the ship left. He broke free from the custody of the ship's captain when he did not return to his vessel. He is the same as any other alien crewman who is detained on board his vessel and jumps his ship to enter the United States. An alien in such a situation has made an entry that puts him in the class of a deportable alien entitled to a due process hearing. In essence, under the parole theory, the petitioner has committed the same violation of the immigration laws. He has entered after being refused permission to land temporarily as a crewman. In a recent determination by a Southern District Court, *Lam Fo Sang* v. *Esperdy,* 210 F. Sup. 786, it was held that an alien who came to our shores in transit and without a visa effected an entry when he absconded from the airport at which he had arrived. The Court ruled that no entry was made while he was physically present at the airport in the continental United States, but one was considered to have been made when he broke free from the custody of the airlines and left the airport. Thus, it can be seen that the petitioner made an entry when he missed his vessel and by that act, he should come under the provisions of Section 243 of the Immigration and Nationality Act of 1952, as amended, and is therefore entitled to a due process hearing under that section of the law.

The issues above are of paramount importance because they deal with the freedom and rights of many aliens. It is not befitting the legal process of the United States, that they should be summarily disposed of by a country as wonderful as ours.

CONCLUSION

Wherefore, in consideration of the magnitude of the questions presented, and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
November 3, 1964

Respectfully submitted,

ABRAHAM LEBENKOFF

AND

JULES E. COVEN,
Attorneys for Petitioner,
33 West 42nd Street,
New York 36, N. Y.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

No. 498—September Term, 1963.

(Argued June 9, 1964 Decided August 20, 1964.)

Docket No. 28587

—o—

WONG HING FUN and NG SUI SANG,
Plaintiffs-Appellants,

—v.—

P. A. ESPERDY, District Director of the Immigration and Naturalization Service, New York District,
Defendant-Appellee

—o—

Before:

MOORE, SMITH, and MARSHALL,
Circuit Judges.

—o—

Appeal from an order of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* which awarded summary judgment to defendant in an action to cancel the revocation of plaintiffs' paroles.

Affirmed.

—o—

JULES E. COVEN, New York, N. Y. (Lebenkoff & Coven, on the brief), *for plaintiffs-appellants.*

ROY BABITT, Spec. Asst. U. S. Atty. (Robert M. Morgenthau, U. S. Atty. for the Southern District of New York, on the brief), *for defendant-appellee.*

MARSHALL, *Circuit Judge*:

Appellants are natives of China who arrived in this country as crewmen on vessels putting in at United States ports. Wong Hing Fun arrived on June 30, 1962; Ng Sui Sang arrived on December 20, 1962. Both sought shore leave under section 252 of the Immigration and Nationality Act of 1952, 8 U. S. C. A. §1282. The immigrant inspector denied leave, because of appellants' failure to possess passports or other travel documents. However, pursuant to the discretionary authority granted the Attorney General by section 212(d) of the Act, 8 U. S. C. A. §1182(d), and delegated to the inspector by applicable regulations, he paroled them temporarily into the United States. Both appellants absconded and failed to depart on their vessels. They were apprehended, and, when their vessels returned in May 1963, their paroles were revoked. Instead of departing on the vessels, they brought an action in the District Court against the District Director of Immigration pursuant to section 279 of the Act, 8 U. S. C. A. §1329, seeking a declaratory judgment that the order revoking parole was illegal because it was entered without a full hearing. Summary judgment was granted the defendant, and the aliens appealed.

There is no basis for appellants' contention that due process requires a hearing on revocation of parole, even though Congress did not provide one. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953); *Tom We Shung* v. *Murff*, 176 F. Supp. 253 (S. D. N. Y. 1959),

affirmed sub nom. Tom We Shung v. *Esperdy*, 274 F. 2d 667 (2 Cir. 1960), *United States ex rel. Paktorovics* v. *Murff*, 260 F. 2d 610 (2 Cir. 1958) is confined to its special facts, as the opinion in that case recognized. For purposes of the Act, appellants never made entries into the United States, and are subject to the exclusion rather than the expulsion provisions of the statute. *Leng May Ma* v. *Barber*, 357 U. S. 185 (1958); *Rogers* v. *Quan*, 357 U. S. 193 (1958); *Kaplan* v. *Tod*, 267 U. S. 228 (1925). The Fifth Amendment does not affect, in any degree, Congress' plenary power over exclusion procedures. As no hearing is provided by statute in cases of this type, appellants were entitled to none.

The judgment is therefore affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 654

NG SUI SANG, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 6-8; Pet. App. 9-11) is reported at 335 F. 2d 656. The opinion of the district court (R. 2-5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1964 (R. 9). The petition for a writ

of certiorari was filed on November 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner, an alien crewman who had been paroled into the United States for such time as his vessel remained in this country, made an "entry" into the United States when he failed to depart on board his ship and the immigration authorities continued his parole until such time as his ship returned to the United States.

2. Whether due process required that petitioner be accorded a hearing upon termination of his parole.

STATUTE AND REGULATION INVOLVED

Section 212(d)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 188, 8 U.S.C. 1182(d)(5), provides:

> The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Immigration and Naturalization Service Regulation No. 212.5, 25 F.R. 7014, 8 C.F.R. (1964 Cum. Supp.) 212.5, provides in pertinent part:

> The district director in charge of a port of entry may, * * * after a finding of inadmissibility has been made, parole into the United States temporarily in accordance with section 212(d)(5) of the Act any alien applicant for admission at such port of entry under such terms and conditions * * * as such officer shall deem appropriate. At the expiration of the period of time or upon accomplishment of the purpose for which parole was authorized or when in the opinion of the district director in charge of the area in which the alien is located that neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he shall be restored to the status which he had at the time of parole, and further inspection or hearing shall be conducted under section 235 or 236 of the Act and this chapter, or any order of exclusion and deportation previously entered shall be executed.

STATEMENT

Petitioner is a native of China who last arrived at the Port of New York, United States, on June 30, 1962, when he applied for shore leave as a non-immigrant crewman attached to a merchant vessel (see R. 2, 7; G. Ex. "A"). Shore leave was denied to the petitioner and other crew members. Shortly thereafter, the Immigration and Naturalization Service

issued petitioner a parole card which recited, *inter alia*: "Your admission cannot be authorized at this time. You are PAROLED until July 29, [19]62 * * * or till ship sails foreign" (G. Ex. "A"). On July 10, 1962, petitioner left his ship. On July 17, 1962, the Service noted that petitioner was "discovered missing", and on July 20 petitioner's vessel left New York without him (see R. 2, 7; G. Ex. "A").

On January 18, 1963, petitioner was arrested by immigation officials for violation of his parole. He was, however, subsequently released on $1,000 bond pending return of his ship. In May 1963, when petitioner's ship returned to the United States, the Service directed the bonding company to surrender the petitioner into custody of the Service in New York City (G. Ex. "A"). The directive, a copy of which was mailed to the petitioner, recited that "YOUR PAROLE WILL BE REVOKED UPON YOUR SURRENDER" (*ibid.*).

The instant proceeding was commenced on May 24, 1963, when petitioner and another crewman-parolee similarly situated[1] filed a complaint in the United States District Court for the Southern District of New York, contending that the Service intended summarily to revoke their parole status and remove them from the United States without a hearing. They requested that the Service be required to accord them a hearing and be enjoined from deporting them. Thereafter, the Service revoked petitioner's parole. On Au-

[1] Mr. Wong Hing Fun, whose case was decided with petitioner's in the lower courts, has not joined in the petition for a writ of certiorari.

gust 15, 1963, the district court granted summary judgment for the defendant (R. 2-5). The court of appeals affirmed on August 20, 1964 (R. 6-8; Pet. App. 9-11).

ARGUMENT

Petitioner contends (Pet. 3-7) that he should have been accorded a formal hearing under the deportation provisions of the 1952 Act because he must be deemed to have made an "entry" into the United States, albeit an illegal one, when he failed to depart from this country on his ship in 1962. The short answer is that petitioner can gain no legally cognizable status because of his act in violation of parole. Section 212 (d)(5) expressly provides that the temporary parole of an alien into the United States "shall not be regarded as an admission of the alien." See, to the same effect, *Leng May Ma* v. *Barber*, 357 U.S. 185, 188-190; *Rogers* v. *Quan*, 357 U.S. 193, 194, 196; *Shaughnessey* v. *United States ex rel Mezei*, 345 U.S. 206, 215; *Kaplan* v. *Tod*, 267 U.S. 228, 230-231; *United States* v. *Ju Toy*, 198 U.S. 253, 263; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 661.[2]

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[2] Contrary to petitioner's suggestion (Pet. 2, 6), there is no occasion for this Court to reconsider, in the context of the instant case, the holding in *Leng May Ma* v. *Barber*, 357 U.S. 185, where the Court held that an alien paroled into the United States was not "within the United States" for purposes of eligibility for a stay of deportation under section 243(h) of the 1952 Act. In the instant case, the question presented concerns itself with whether petitioner made an entry into the United States for purposes of the deportation provisions, a matter foreclosed by section 212(d)(5) and numerous decisions of this Court.

Petitioner's subsequent disappearance had the practical effect of extending the period of parole until he could be restored to the status of a person on board ship, but it did not change his legal status as an alien who had never made an entry into the United States. When he was apprehended, petitioner was restored to the same status as when he was paroled, an alien crewman who had not been admitted into the United States. The Service had a right to hold him as an excluded crewman until it could effect his physical departure on his ship; the fact that it was willing to permit him to be released on bond during that period in no way affects his status. Petitioner physically entered as a parolee and remained a parolee who in legal effect never entered the United States. His situation is no different than it would be if he had been paroled for 10 days for some urgent reason, such as hospital treatment, and the time had been extended because of the necessity of longer treatment. The departure of the ship would not change the legal status of such a parolee. Similarly, the departure of the ship did not change petitioner's status.

There was no requirement, as petitioner seems to suggest (Pet. 4-5), of a hearing for termination of his parole. This Court has long recognized that aliens "on the threshold of initial entry" into the United States stand on a different footing from aliens who have "once passed through our gates," and that "(w)hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Shaughnessey* v. *United States ex rel Mezei*, 345 U.S. 206, 212; *United States ex rel Knauff*

v. *Shaughnessey*, 338 U.S. 537, 544. Since Congress has not provided for a hearing upon termination of parole, petitioner was entitled to none. *Ahrens* v. *Rojas*, 292 F. 2d 406, 408-410 (C.A. 5;) see *Gomez-Fernandez* v. *Immigration and Naturalization Service*, 316 F. 2d 732, 733 (C.A. 5), certiorari denied, 375 U.S. 942. This is particularly true of petitioner, who came as a seaman with no color of any claim to be entitled to enter the United States.[3]

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

DECEMBER 1964

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[3] Petitioner's reliance upon *United States ex rel Paktorovics* v. *Murff*, 260 F. 2d 610 (C A. 2), is misplaced. In that case, the court held that the Hungarian parolee there involved was entitled under section 212(d)(5) of the 1952 Act to a hearing upon revocation of his parole since upon acceptance by the parolee of an official invitation by the United States government to enter this country the parolee obtained a status which entitled him to constitutional safeguards. The court stated that its decision was *sui generis* "[b]y reason of the circumstances under which the Hungarian refugees were paroled into the United States * * *." *Id.* at 613.

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